IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 896 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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STATE OF GUJARAT

Versus

DHANSUKH BUDHIABHA RATHOD

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Appearance:

1. Criminal Appeal No. 896 of 1984

MR DP JOSHI, APP for the appellant

MR JM BUDDHBHATTI for Respondent

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 11/10/2001

ORAL JUDGEMENT

By filing this appeal under section 378 of the Code of Criminal Procedure, 1973, the State of Gujarat has challenged the judgment dated November 29, 1983

rendered by the learned Judicial Magistrate, First Class, Surat, in Criminal Case No. 9132/83, by which the respondent is acquitted of the offence punishable under section 379 of the Indian Penal Code.

2. Shri Kantilal Amratlal Thakker, residing at Saraswati Apartment, Surat, had lodged complaint on July 7, 1982 with Athwalines Police Station, Surat, stating, inter-alia, that he had parked his Car on July 6, 1982 at the parking place provided in his Apartments and that when he had come down from his apartment on July 7, 1982 at about 9.45 a.m., he had found that the door of the Car was open and tape-recorder with radio of Sony make was stolen. The complaint lodged by Mr. Thakker was investigated by Police Sub Inspector, Detection of Crime Branch, Surat and during the course of investigation, the respondent was arrested. On conclusion of investigation, the respondent was chargesheeted of the offence punishable under section 379 of the Indian Penal Code in the Court of learned J.M.F.C., Surat. In the chargesheet, it was mentioned that the prosecution was to examine eleven witnesses in support of its case against the respondent and that summons should be issued to the witnesses directing them to attend the Court. Though the learned Magistrate received the chargesheet on November 8, 1983, the learned Magistrate did not issue any summons to any of the witnesses proposed to be examined by the prosecution. Thereafter, the case was taken-up for hearing by the learned Magistrate on November 29, 1983. The learned Magistrate noticed that no direct allegation of commission of theft was levelled against the respondent and that he had spent more time in jail as an undertrial prisoner than the sentence which would have been awarded to him if he had been convicted. The learned Magistrate further observed that no care was taken by the police to examine any of the witnesses in order to prove the charge against the respondent. At the time when the criminal case against the respondent was taken-up for hearing, it was noticed by the learned Magistrate that Mr. K.S.Trivedi, P.S.I. of D.C.B., was present in the Court and, therefore, the learned Magistrate had tried to know from the learned A.P.P. whether he was inclined to examine P.S.I. Mr. Trivedi in support of the charge levelled against the respondent. The learned A.P.P. had informed the Court that he was inclined to examine P.S.I. Mr. K.S.Trivedi after other witnesses were examined. Hence, the learned Magistrate was of the opinion that the prosecution was negligent in conducting the case against the respondent and that the respondent was entitled to be acquitted. In view of the above-referred to conclusions, the learned Magistrate has

acquitted the respondent of the offence punishable under section 379 I.P.C. by judgment dated November 29, 1983, giving rise to the present appeal.

3. Mr. D.P.Joshi, learned counsel for the State Government, submitted that though section 242 of the Code of Criminal Procedure, 1973 specifically requires the Magistrate to issue summons to the witnesses directing them to attend the Court when the accused refuses to plead or does not plead guilty or claims to be tried, the learned Magistrate had not issued summons to any of the witnesses in spite of an application having been made by the prosecution in this regard and, therefore, the learned Magistrate was not justified in holding that the prosecuting agency was careless in conducting the case. The learned counsel emphasised that no one should suffer on account of mistake committed by the Court and when the learned Magistrate had not issued summons to any of the witnesses, the case of the prosecution could not have been thrown overboard by holding that the prosecuting agency was careless in conducting the case against the respondent. What was stressed was that had sufficient opportunity been given, the prosecuting agency could have examined the witnesses to prove its case against the respondent and as the learned Magistrate has disposed of the case in undue haste, the appeal should be allowed. According to the learned A.P.P., when summonses to the witnesses were not issued by the learned Magistrate, the learned Magistrate could not have insisted that the learned A.P.P. should examine P.S.I. Mr. Trivedi, who was incidentally present in the Court with reference to another case and as the whole approach adopted by the learned Magistrate is totally erroneous, the same should be deprecated by the Court while reversing the judgment impugned in the appeal. The learned counsel lastly submitted that the appeal filed by the State Government should be accepted and the matter should be remanded to the learned Magistrate with a direction to give full opportunity to the prosecuting agency to prove its case against the respondent.

4. Mr. Jiten M. Budhbhatti, learned counsel for the respondent, contended that as the prosecution was negligent in conducting its case against the respondent, the appeal should not be entertained. According to the learned counsel for the respondent, the chargesheet does not indicate that any direct allegation of commission of theft was levelled against the respondent and, therefore, the judgment impugned in the appeal should not be interfered with. What was claimed was that the respondent was under detention as an undertrial prisoner

for sufficient time and, therefore, in view of lapse of time between the date of the judgment rendered by the learned Magistrate and the date on which the appeal is taken-up for hearing, the matter should not be remanded to the learned Magistrate, as claimed by the learned A.P.P., and the judgment impugned should be confirmed.

5. I have heard the learned counsel for the parties and taken into consideration the record of the case. From the record of the case, it is evident that complainant Shri K.A.Thakker had lodged complaint on July 7, 1982 with Athwalines Police Station stating, inter-alia, that from his Car, tape-recorder with radio of Sony make was stolen on July 6, 1982. There is no manner of doubt that the said complaint was investigated by Mr. K.S.Trivedi, P.S.I. of D.C.B. Surat, and that on conclusion of investigation, the respondent was chargesheeted of the offence punishable under section 379 I.P.C. Along with the chargesheet, first information report lodged by Mr. Thakker and other documents were also forwarded to the learned Magistrate. In the chargesheet itself, it was mentioned that the prosecution was to examine eleven witnesses in support of its case against the respondent and the learned Magistrate was specifically requested to issue summonses to the witnesses calling upon them to attend the Court on the date to be fixed for examination of the witnesses. However, the said request made by P.S.I, DCB, Surat City was not taken into consideration by the learned Magistrate at all and no summons was issued to any of the witnesses directing him to attend the Court on the date which was to be fixed for his examination. Chapter-XIX of the Code of Criminal Procedure, 1973 deals with trial of warrant cases by Magistrate and section 242 of the Code reads as under :-

"242. Evidence for prosecution :-(1) If the accused refuses to plead, or does not plead or claims to be tried or the Magistrate does not convict the accused under section 241, the Magistrate shall fix a date for the examination of witnesses.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

(3) On the date so fixed, the Magistrate shall proceed to take all such evidence as may

be produced in support of the prosecution:

Provided that the Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."

A bare reading of the above quoted provisions of section 242 makes it manifest that if the accused refuses to plead guilty or does not plead or claims to be tried or the Magistrate does not convict the accused under section 241, the Magistrate has to fix a date for examination of witnesses. Sub-section (2) of section 242 requires the learned Magistrate to issue a summons to any of the witnesses proposed to be examined by the prosecution directing the witness to attend the Court on the date fixed for his examination. The Magistrate has to issue summons on the application of the prosecution. The record of the case makes it more than clear that the application was submitted by the prosecution requesting the learned Magistrate to issue summonses to witnesses whose names were mentioned in the chargesheet, but unfortunately the learned Magistrate did not issue any summons to any of the witnesses at all. It is true that speedy trial is a fundamental right guaranteed to an undertrial prisoner, but without giving any opportunity worth the name to the prosecution to prove its case against the respondent, the case could not have been taken-up for hearing by the learned Magistrate at all. Further the investigating officer, who was incidentally present in the Court with reference to another case, could not have been directed to step into the witness box to prove charge against the respondent, particularly when no summons, as required by section 242(2) of the Code of Criminal Procedure, was issued to him. There is no manner of doubt that the learned Magistrate has disposed of the case in undue haste and has caused damage to the prosecution case. It is worthwhile to note that after lodging of complaint on July 7, 1982, the case was thoroughly investigated and chargesheet was submitted in the Court on November 8, 1983, but the whole exercise undertaken by the investigating agency is rendered nugatory because of the undue haste made by the learned Magistrate in disposing of the case. There was no carelessness on the part of the prosecution at all in not examining the witnesses in support of its case against the respondent and the respondent could not have been acquitted on specious plea that the prosecution had failed to establish the charge against the respondent.

Having regard to the facts of the case, I am of the opinion that the reasons given by the learned Magistrate for acquitting the respondent are not only contrary to the record of the case, but also contrary to express provisions of the Code of Criminal Procedure and, therefore, the judgment impugned is liable to be set aside. In normal circumstances, the case should be remanded to the learned Magistrate for retrial because no one should suffer on account of mistake committed by the Court. However, the fact remains that the respondent was under detention during the course of investigation and trial for a pretty long time. Further, acquittal of the respondent was recorded by the learned Magistrate on November 29, 1983, whereas the appeal has been taken-up for final hearing on October 11, 2001, i.e. approximately after 19 years. Moreover, on April 13, 2000, following order was passed by Hon'ble Mr. Justice J.R.Vora in this appeal :-

"Learned A.P.P. is not present.Learned advocate Mr. J.M.Budhbhatti is present for the opponent. However, the appeal is required to be heard in the presence of the opponent. Learned advocate Mr. J.M.Budhbhatti submits that he is an appointed advocate and may not be able to contact the opponent-accused. In these circumstances, office is directed to issue bailable warrant against the opponent accused for a sum of Rs. 5000/- (Rupees Five thousand only).
13.04.2000 (J.R.Vora,J.)"

Mr. Budhbhatti, learned counsel for the respondent, has informed the Court that the police has not been able to execute the bailable warrant issued by the Office pursuant to the direction given by the High Court. Further, in view of the passage of time, it may not be possible for the prosecution to secure the presence of the witnesses and examine them in order to prove its case against the respondent. Having regard to the facts and circumstances of the case, I am of the view that no useful purpose would be served by remanding the matter to the learned Magistrate and any direction at this late stage to the learned Magistrate to issue summonses to the witnesses would not be in the interest of justice. Having regard to the totality of the facts and circumstances of the case, I am of the view that though the reasons assigned by the learned Magistrate for acquitting the respondent cannot be upheld, the appeal cannot be allowed and the prayer made by the learned A.P.P. to remand the case with a direction to the learned Magistrate to give sufficient opportunity to the

prosecution to prove its case against the respondent can not be entertained.

For the foregoing reasons, the appeal fails and is dismissed. Office is directed to send a copy of this judgment to Mr. B.V.Rathod, who was then discharging duties as Judicial Magistrate, First Class, Surat. Muddamal to be disposed of in terms of direction given in the impugned judgment.

(patel) (J.M.Panchal,J.)